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No. 80-1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES,
Petitioner,

v.

DEFENDERS OF WILDLIFE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Is a rulemaking by a federal agency, authorized by statute, immune from judicial review merely because the rulemaking involves the application of standards derived from a treaty?

2. Was the court of appeals' application of the standards for judicial review set forth in the Administrative Procedure Act consistent with decisions of this Court?

STATUTORY PROVISIONS INVOLVED

Pertinent to the issues in this action are the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. No. 8249, ratified by U.S.

Senate, 119 Cong. Rec. 28012 (1973), section 8(e) of the Endangered Species Act of 1973, 16 U.S.C. § 1537(e) (1976), and section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1976). The Convention and section 8(e) of the Endangered Species Act of 1973 have been reprinted in the petitioner's appendix. Section 10 of the Administrative Procedure Act provides in pertinent parts:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . ."

5 U.S.C. § 704.

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . ."

5 U.S.C. § 706(2)(A).

STATEMENT

Respondent Defenders of Wildlife challenged a rulemaking by a federal agency, the Endangered Species Scientific Authority (hereinafter "ESSA"), which would have permitted essentially unlimited export of bobcat pelts during the 1979-80 season. The primary basis for this challenge was that ESSA's approval of export was arbitrary and capricious and not in accordance with law because ESSA did not act in conformity with provisions of the applicable treaty. After review of lengthy trial-court and administrative records, the court of appeals

declared invalid the guidelines ESSA had employed to make its export findings and remanded the case to the district court with instructions to reexamine the rulemaking record.

The treaty and implementing act. — International trade in bobcat pelts, and the export of such pelts from the United States, is regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter "CITES" or "the Convention"). Sixty-seven nations, including the United States, have signed this treaty. 46 Fed. Reg. 28192 (1981).

CITES recognizes the "irreplaceable part" played by the bobcat and other listed species in the "natural systems of the earth," and declares that "international cooperation is essential for the protection of [these] species against overexploitation through international trade." CITES, Preamble. It is undisputed in this action that 80 to 90 percent of all bobcats killed in the United States are killed for the export of their pelts. 44 Fed. Reg. 40842, 40843 (1979).

The bobcat is listed in Appendix II of the Convention as a species "which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to *strict regulation* in order to avoid utilization incompatible with their survival . . . ." CITES, Art. II, para. 2(a)(emphasis supplied). Specimens included in Appendix II may be exported only pursuant to an export permit, which may be granted only if "a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species" and a "Management Authority" of the exporting state "is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora." Art. IV, para. 2(b). Whenever a Scientific Authority determines that export of an Appendix II species should be limited in order to "maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level" at which it might become endangered, "the Scientific Authority shall advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permits for specimens of that species." Art. IV, para. 3.

In section 8(e) of the Endangered Species Act of 1973, 16 U.S.C. §1537(e) (1976), Congress directed the President to designate the Scientific and Management Authorities under the Convention. By Executive Order No. 11911, dated April 13, 1976, 41 Fed. Reg. 15683, the President established ESSA as the Scientific Authority under the Convention and designated the Secretary of the Interior as the Management Authority under the Convention.[1] The Secretary delegated his authority as Management Authority to the Fish and Wildlife Service.

The administrative actions. — From the outset, ESSA has conducted annual rulemakings to evaluate the impact of export on survival of the bobcat species and has issued findings of "no detriment" on a state-by-state basis. In 1978, ESSA published a statement of the information it would "need in order to support a finding in favor of export of bobcat . . . taken in 1978-79". 43 Fed. Reg. 15098 (1978). Styled "GUIDELINES FOR ESSA FINDINGS IN FAVOR OF EXPORT," this notice stated the methodology with which all subsequent no-detriment findings have ostensibly been made. *See* 44 Fed. Reg. 55540, 55541 (1979); 45 Fed. Reg. 64520 (1980).

ESSA's guidelines set forth certain "minimum requirements for biological information" in order to make a finding that export will not be detrimental to the survival of the bobcat species:

> "1. Population trend information . . . the method of determination to be a matter of State choice.
>
> 2. Information on total harvest of the species.
>
> 3. Information on distribution of harvest.
>
> 4. Habitat evaluation."

43 Fed. Reg. 15098, 15099 (1978). As an "interim alternative," ESSA's guidelines provide that it may rely on "past

[1] While this case was pending on appeal, Congress amended the Endangered Species Act to designate the Secretary of the Interior as both the Management and the Scientific Authority under the Convention. It further provided that the functions of each authority should be carried out by the United States Fish and Wildlife Service (hereinafter "Fish and Wildlife Service"). 16 U.S.C. § 1537a (Supp. III 1979).

reported harvest." Alternatively, if available population data and harvest information are lacking or are very limited or suggest that past harvest has been detrimental, ESSA's guidelines state that, if a state simply follows certain "management initiatives," this "could weigh heavily in favor of a finding of no detriment by the ESSA." *Id.* These "minimum requirements for a management program" are:

> "1. There should be a controlled harvest . . . methods and seasons to be a matter of State choice.
>
> 2. All pelts should be registered and marked.
>
> 3. Harvest level objectives should be determined annually."

Id. Thus, ESSA's guidelines, while ostensibly requiring minimum biological data, permit no-detriment findings to be made merely on the basis of past reported harvest (kill) data, and in fact promise to dispense with even that formality if a state takes minimal management initiatives.[2]

Applying these highly flexible standards, ESSA repeatedly approved essentially unrestricted export of bobcat despite admittedly scanty information "on population size, population trend, or the impact of commercial trade" on the bobcat.[3] For both the 1978-79 and 1979-80 seasons, every state or Indian nation requesting export authorization from ESSA received approval without a single disapproval or cutback.

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[2] In the 1979-80 rulemaking which is the subject of this action, ESSA approved for unrestricted export states which could not satisfy even its minimum management program requirements. *See* 44 Fed. Reg. 55540, 55541-42, 55544-45 (1979); 44 Fed. Reg. 40842, 40847-49 (1979).

[3] In a letter to the Director of the Fish and Wildlife Service, dated January 4, 1979, William Y. Brown, ESSA's Executive Secretary, wrote concerning the bobcat:

> "Little reliable information of any kind is available on population size, population trend, or the impact of commercial trade. What data we have give cause for some concern for the status of the species. Most research likely to provide useful data is still in an embryonic stage."

J.A. 1460.

The proceedings below. — Two months after ESSA had completed its rulemaking for the 1979-80 season, Defenders filed suit against ESSA, the Fish and Wildlife Service, and others. The complaint stated six claims for relief, each challenging the government's regulation of bobcat exports on a different ground. Defenders requested that ESSA's guidelines, its findings approving export of bobcats taken in the 1979-80 season, and the Fish and Wildlife Service's regulations implementing its management responsibilities under CITES be declared invalid.

The district court granted a temporary restraining order barring the export of bobcats. It consolidated the evidentiary hearing on the request for a preliminary injunction with trial on the merits. At trial, the entire administrative record was introduced as evidence and extensive expert testimony proffered to explain the record and pinpoint deficiencies in both ESSA's data and its methodology as expressed in its guidelines.

The trial court granted defendants' motion to dismiss at the close of plaintiff's case with respect to twenty-six states and the Navajo Nation. No reasons for this dismissal or findings of fact were stated either at the trial or in the court's subsequent memorandum opinion.[4]

After the trial, the court ruled on the remaining nine states. The court held in favor of Defenders as to five states and part of two others. Its opinion contained no mention of five of the complaint's six counts or of its prayer for a declaratory judgment. Although the complaint challenged both ESSA's guidelines and its approval of exports for the 1979-80 season, the district court's opinion and order addressed only exports.

On appeal, the petitioner contended that Article IV of the Convention gives Defenders no judicially enforceable rights. It argued that Article IV is not self-executing and that Congress

[4] As the court of appeals found, this was clear non-compliance with Rule 41(b) of the Federal Rules of Civil Procedure, which requires the district court to state specific findings of fact and conclusions of law in support of its judgment. Appendix to the Petition (hereinafter "P.A.") 14a-15a.

had not implemented it. The federal defendants made a similar argument in their brief, but at oral argument conceded that Congress had implemented the Convention through section 8(e) of the Endangered Species Act of 1973, 16 U.S.C. §1537(e) (1976). P.A. 10a. Reviewing the legislative history of section 8(e), the court found it unnecessary to determine whether the Convention was self-executing because it concluded that Congress had implemented the treaty. *Id.* at 10a-12a.

The court held that ESSA's guidelines were inconsistent with the mandate of CITES. It found that an informed and therefore valid finding that "export will not be detrimental to the survival of" the bobcat species (CITES, Art. IV, para. 2(a)) cannot be made without adequate information on total bobcat population and the number to be killed in a particular season. Yet the guidelines contemplate and permit no-detriment findings without that information. P.A. 17a. Further, the court found they had been applied with an attitude that seemed to abhor the "strict regulation" required by the Convention, Art. II, para. 2(a). "The approach of the Scientific Authority often seemed primarily concerned with an acceptable basis for authorizing bobcat exports despite the absence of convincing factual grounds for making no-detriment findings." P.A. 19a. The court therefore declared ESSA's guidelines invalid, and remanded the proceeding to the district court for a reexamination of the rulemaking record.

On remand, Defenders withdrew its request for an injunction against exports from past seasons. The federal defendants represented that they have begun the administrative process for issuing new export guidelines and that they would authorize no export of bobcats for the 1981-82 season until those guidelines are promulgated. With the consent of all parties, the district court enjoined export of bobcats taken or killed subsequently to July 1, 1981, until new guidelines consistent with the court of appeals decision are promulgated and findings made on the basis of those guidelines. Appendix hereto, 1A-2A.

The federal defendants are not seeking further review by this Court.

REASONS FOR DENYING THE WRIT

Respondent Defenders of Wildlife and a government agency have been in disagreement as to the congruence of the agency's action with the governing statute and treaty. That disagreement has been resolved by the court below, and the government has accepted that result. Petitioner, an intervenor below, suggests that the court below has improperly infringed on the authority of the executive branch and has improperly exercised its power to review agency action. Neither contention warrants further consideration by this Court.

I. The Decision Below Is Fully in Accord with Prior Decisions of This Court Concerning Judicial Interpretation of Treaties.

Petitioner's principal contention is that the rulemakings of ESSA and its successor are immune from judicial review because of the "considerable potential for interference in the executive's conduct of foreign policy and detriment to the principle of separation of powers."[5] Petition 8. The decisions of this Court afford no support for this contention.

To the contrary, this Court's decisions interpreting section 10 of the APA (5 U.S.C. §§701-06) make clear that it creates a basic presumption of reviewability. Section 10 "undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Califano* v. *Sanders*, 430 U.S. 99, 104 (1977). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U.S. at 136, 141 (1967).

Petitioner seeks to support its position by invoking decisions of this Court that concern the political-question doctrine and intertwining its discussion of these cases with the contention that both courts below erred in finding that CITES has been implemented by section 8(e) of the Endangered Species Act of 1973, 16 U.S.C. §1537(e).

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[5] This argument was not made below; hence the decision had no occasion to address it.

The present controversy clearly does not fall within any of the formulations for identifying political questions. *See Baker* v. *Carr*, 369 U.S. 186, 217, 226 (1962). There is no greater separation-of-powers problem in this case than in any other case where courts review administrative action, a function which has been entrusted to them by Congress. Nor have the courts hesitated to interpret and enforce treaties. *See, e.g., Bacardi Corp.* v. *Domenech*, 311 U.S. 150 (1940); *Asakura* v. *City of Seattle*, 265 U.S. 332 (1924); *People of Saipan* v. *Department of Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). Indeed they must, for Article VI of the Constitution makes treaties part of the supreme law of the land.

The decision below does not have the potential for embarrassment to the government abroad to which the Petition alludes. *See* Petition 11.[6] The court of appeals' interpretation of CITES is consistent with the position taken by the United States delegation to the conference that negotiated the treaty. *See* Tr. 76-80. It is also consistent with the interpretation of the treaty to which the Secretary General of the Convention adheres. *See* J.A. 730-33. Moreover, the consequences of the court of appeals decision are entirely domestic: some trappers may be denied export permits unless better data are collected. The executive branch will remain free to take any position it wishes in international negotiations. Obviously the federal government, which has not sought certiorari, does not share petitioner's view that the decision below will embarrass or hinder the conduct of foreign relations.

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[6] There are broad appeals in the Petition to the alleged foreign-relations aspect of this case, quoting dicta from United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). These appeals vastly overstate and obscure the law in this area. As this Court has declared:

> "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case and of the possible consequences of judicial action."

Baker v. Carr, *supra*, 369 U.S. at 211-12 (footnotes omitted).

Nor did the courts below err in finding that Congress had implemented CITES. In section 8(e) of the Endangered Species Act of 1973, Congress provided that the agencies it directed the President to designate as the Scientific and Management Authorities "pursuant to the Convention.... shall thereafter be authorized to do all things assigned to them under the Convention, including the issuance of permits and certificates."[7] The legislative history of the Endangered Species Act makes it abundantly clear that Congress intended to implement Article IV of CITES by legislative incorporation. *See* S. Rep. No. 93-307, 93d Cong., lst Sess. 5 (1973); 119 Cong. Rec. 25670, 25676, 30164 (1973); S. Exec. Rep. No. 93-14, 93d Cong., lst Sess. 3 (1973). The United States has acknowledged, before the other Parties to the Convention, that CITES is implemented by the Endangered Species Act.[8] In the proceedings below, counsel for the government on two separate occasions represented that the Convention has been implemented by section 8(e) of the Endangered Species Act. *See* P.A. 10a; Tr. 5-6, 20.[9]

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[7] The Petition's argument that the court of appeals erred in finding that Congress had implemented CITES by means of section 8(e) makes much of a small difference in wording between its first and second sentences. In the first sentence, the President was "directed and authorized" to establish a Management Authority and a Scientific Authority, while in the second sentence these agencies were simply "authorized" to do all things assigned to them under the Convention. Thus, petitioner contends Congress "intentionally limited itself" and "knowingly refrained from using mandatory language." Petition 12, n.6. What this argument overlooks is that the Convention was not yet in force when this implementing legislation was enacted and, by its own provision, would enter into force only when ten nations had ratified it, an event which did not transpire until 1975. CITES, Art. XXII.

[8] Second Meeting of the Conference of the Parties, San Jose (Costa Rica), 19 to 30 March 1979, Report Presented by the Delegation of the United States of America (Doc. Inf. 2.11) 1 (1979); Convention on International Trade in Endangered Species of Wild Fauna and Flora, Annual Report for 1977 by the United States of America 5 (Nov. 13, 1978).

[9] Nor is there any conflict, as petitioner suggests, between the court's decision and Hopson v. Kreps, 622 F.2d 1375 (1980). That decision reviewed a district court order that had dismissed a suit challenging Commerce Department regulations as inconsistent with a treaty and federal statutes. In the portion of the opinion to which petitioner cites, the court was

(footnote continues)

II. The Decision Below Does Not Conflict with Any Decision of This Court Applying the APA's Standards for Judicial Review.

The decision below is a straightforward application of *Camp* v. *Pitts,* 411 U.S. 138 (1973). Examining the trial court's explanation of its rulings, the court of appeals concluded:

> "This analysis suggests that the court reviewed the no-detriment findings on the basis of its own evaluation of the conflicting testimony at the trial rather than on the administrative record. The district court thus appears to have followed the procedure that the Supreme Court condemned in *Camp* v. *Pitts, supra,* as an inappropriate standard of review in a case such as this: 'to hold a *de novo* hearing . . . and thereafter determine whether the agency action was "unwarranted by the facts." ' 411 U.S. at 141. *Cf. Citizens To Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 415, 420-21."

P.A. 21a. Accordingly, the court remanded the case, directing the trial court to review the administrative record in a manner consistent with *Camp* v. *Pitts* and to determine whether each of the agency's no-detriment findings was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

Thus, the court of appeals did not conduct a *de novo* review of the administrative record; it remanded for review of that record by the trial court. Whether ESSA's no-detriment findings were "rational and based on consideration of the relevant factors," *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775, 803 (1978), is a question it left to

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(footnote continued)

simply saying that "[t]he issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute." *Id.* at 1380. In the case at bar, the court followed this principle and found that the intent of section 8(e) was to implement the Convention so that it "can be a source of rights enforceable by an individual in a domestic court of law." P.A. 12a, *quoting* People of Saipan v. Department of Interior, *supra,* 502 F.2d at 97.

be decided on remand. The court carefully confined its analysis to addressing questions of law and interpreting the relevant statutory and treaty provisions.

The court of appeals also set aside ESSA's guidelines "to the extent they authorize findings that the export of bobcat would not be d[illegible]mental to the survival of the species that are not based upo[illegible]liable estimates of the bobcat population and data showing the total number of bobcats to be killed" in the particular season. P.A. 29a. In so doing, the court construed the Convention's requirement that export be permitted only upon a scientifically supported finding that it will not be detrimental, but it left to the agency "considerable discretion to determine the method by which the estimate may be made and in evaluating its reliability." *Id.* at 19a.

Petitioner's claim that this ruling upon the proper construction of the treaty's language conflicts with principles of judicial review stated in decisions by this Court is without foundation. Interpretation of documents having legal force is quintessentially a judicial function. Section 10(e) of the APA provides in relevant part that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (1976).[10] *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976), on which petitioner relies, is in no way inconsistent. In that case, the Court found the court of appeals had overstepped the bounds of its reviewing authority by "dictating to the agency the methods, procedures, and time dimension of the needed inquiry without opportunity for further consideration on the basis of the

[10] "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law." Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922); *see* Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 270 (1960). Similarly, where ascertaining meaning requires analysis of legislative history or determination of basic statutory policy, the courts not the agencies are the specialists. *See* NLRB v. Savair Manufacturing Co., 414 U.S. 270, 276-77 (1973); FTC v. Fred Meyer, Inc., 390 U.S. 341, 355-57 (1968); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 542 (1960).

new evidence by the agency." *Id.* at 333. This decision simply has no relevance to the present case.

III. The Decision Below Is of Limited Significance.

Petitioner concludes with predictions of dire consequences for wildlife management programs.[11] That the federal defendants have not sought certiorari itself belies that conclusion. Moreover, the court below left to the agency's discretion the methods for estimating population and evaluating the reliability of such estimates. Since such methods have not yet been announced by the agency, claims as to their costs are clearly premature. Moreover, there is no fundamental right to export bobcat pelts. If the costs of studies to ensure that export will not be detrimental to the species are high, state agencies can forgo requesting export approval or pass the costs of such programs through to the fur industry in the form of permit or tagging fees.

Petitioner's final argument is that the opinion below might have a substantial impact on "a wide range of wildlife management decisions." Petition 17-18. In fact, there are only three other Appendix II species for which OSA makes no-detriment findings through an annual rulemaking: river otter, lynx, and alligator. The court of appeals decision affects only rulemaking concerning these three species.

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[11] Petitioner relies largely on citations to scientific literature never introduced in either the administrative or the judicial proceedings. Respondent could produce its own laundry list of scientific literature demonstrating the extravagance of petitioner's claims. The proper answer, however, is that such material is not before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE

United States District Court

FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, INC.
Plaintiff

v.

ENDANGERED SPECIES SCIENTIFIC AUTHORITY, *et al.*,
Defendants

v.

RAYMOND J. DRISCOLL, *et al.*

and

FUR CONSERVATION INSTITUTE OF AMERICA

and

INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES,
Intervenor-Defendants

Civil Action No. 79-3060

FILED
April 23, 1981
James E. Davey,
Clerk

ORDER

On February 3, 1981, the Court of Appeals remanded this case with instructions to make further findings of fact and conclusions of law concerning the legality of exports of bobcats taken during the 1979-1980 season. These findings and conclusions were to be governed by standards for allowing export set forth in the Court's opinion. The guidelines under which federal defendants had made their export findings were declared invalid by the Court for their failure to require both a reliable estimate of bobcat populations and information concerning the number to be killed in a particular season.

At a status hearing held April 15, 1981 in this Court, plaintiff Defenders of Wildlife stated that, while the Court of Appeals' opinion renders previous guidelines invalid, it no longer seeks an injunction prohibiting exports of bobcats from the 1979-1980 season. Nor does it seek to enjoin exports from the succeeding 1980-1981 season. Defenders' present concern is that federal defendants promulgate and properly implement scientific guidelines consistent with the Court of Appeals' decision.

For their part, federal defendants stated that they have begun the administrative process for issuing new export guidelines and that they would authorize no export of bobcats for the 1981-1982 season until those guidelines are promulgated. Federal defendants also indicated that they are considering seeking relief in the Supreme Court, but that absent such relief, they have no objection, in light of the Court of Appeals decision, to an injunction prohibiting 1981-1982 bobcat exports until findings based on the new guidelines have been made.

In view of these developments, the Court hereby orders as follows:

Federal defendants are permanently enjoined from authorizing export of bobcats taken or killed subsequently to July 1, 1981, until they promulgate guidelines consistent with the Court of Appeals decision and make findings on the basis of those guidelines;

Those portions of the complaint concerning export of bobcats taken during previous seasons are dismissed.

SO ORDERED.

April 22, 1981

/s/ JUNE L. GREEN

United States District Judge